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Reining in the American Litigator: The New Role of American Judges

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American litigation has often gained the attention of the world. Three years ago, for example, the $145 billion award against the tobacco industry in a Florida court was front-page news in Japan, at least in the English language papers.[1] In achieving such outcomes, the American lawyer has long seemed unique in the world—almost a cowboy figure doing justice against the odds. In the Florida case, for example, the plaintiffs' lawyer was quoted as saying, "It was a day of reckoning. This was never about money alone. This was about showing those companies up for what they are."[2] In the same vein, a

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1. *See, e.g., Smokers Awarded $145 Billion in Florida From Tobacco Firms*, JAPAN TIMES, July 16, 2000, at 1 (reproducing Marc Kaufman, *Tobacco Suit Award: $145 Billion; Fla. Jury Hands Industry Major Setback*, WASH. POST, July 15, 2000, at A1). In 2003, that punitive damages verdict was overturned. *See* Gary Young, *A Huge Win For the Companies, But the Impact is Debated*, NAT'L L.J., May 26, 2003, at A1 (describing reversal by Florida Court of Appeal).

Stories about American litigation continue to appear in papers in Japan. *See* Alex Berenson, *Lawsuits Give Drug Firms Bigger Headaches*, INT'L HERALD-TRIBUNE/ASAHI SHIMBUN, May 20, 2003, at 13 (describing increase in suits in the United States against drug makers).

2. Kaufman, *supra* note 1. Similarly, a more recent newspaper article about American suits, published in Japan, said that "top plaintiffs' lawyers in the United States have trained their sights on drugmakers," seeking to supplant federal regulators:

> In some instances, teams of plaintiffs' lawyers are spending several million dollars preparing cases for trial in hope of winning billions of dollars in settlements and jury verdicts against the drug companies, which have some of the deepest pockets among U.S. corporations.
>
> The lawyers pursuing the suits say that the food and drug agency has failed to protect patients from dangerous drugs and that the companies have tried to hide side effects. But the agency says medicines are safer now than they have ever been.

recent book about the plaintiff attorneys who successfully sued the tobacco industry was entitled *Civil Warriors*.[3]

This vision of the American lawyer has captivated movie makers, TV producers, and many others (including a significant segment of the public). To a singular extent, American lawyers are at the center of important events in the United States. For example, the *Wall Street Journal* recently reported on the suit filed by famed plaintiffs' lawyer Ronald Motley against an array of prominent Saudi Arabians, accusing them of providing financial support for the September 11 terrorists.[4] The U.S. government has expressed concern that this suit could upset U.S.-Saudi relations, but Motley responded, "[t]he fact that it complicates the life of some baggy-britches Foggy Bottom guy [a reference to U.S. diplomats] is not my concern."[5] Other suits brought by private lawyers have prompted a similar reaction by the State Department.[6]

The American judge, on the other hand, has remained a background figure, rarely taking the initiative and serving instead as a passive, impartial umpire in the contest of the lawyers. In many other countries, the judge seems more in control. For example, when proceedings in Spain were brought against former President Pinochet of Chile, they were initiated and pursued by a judge, not by a lawyer. In much of the world, the tradition has been for the judge to gather evidence and refine the case, albeit acting on the "suggestions" of the lawyers.

During the last half-century, however, the latitude accorded the American lawyer has increasingly been reined in by American judges. Although there has been resistance to this trend, it shows no signs of abating. This paper attempts to portray the background and evolution of this trend. It begins with a very general sketch of the role of attorneys in U.S. society and government, and then examines the procedural features of American litigation until the mid-twentieth

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Berenson, *supra* note 1.

3. DAN ZEGART, CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY (2000).

4. Milo Gevelin & Jess Bravin, *Litigating Terror: Tobacco Lawyer Fights Saudis in a Sept. 11 Suit*, WALL. ST. J., Dec. 12, 2002, at A1.

5. *See id.*

6. *See id.* (reporting that the State Department has asked a judge to dismiss another suit, this one against ExxonMobil Corp. concerning atrocities allegedly committed by Indonesian troops guarding an Exxon facility in that country. The State Department said that this suit "'would risk a potentially serious adverse impact on significant relations related directly to the ongoing struggle against terrorism.'").

century, which placed primary emphasis on the lawyers. It then explains how both procedural changes and substantive shifts prompted increased judicial supervision, which came to be known as managerial judging. It concludes by reviewing American objections to these shifts.

I. The Distinctive Role of American Lawyers

In the early nineteenth century, de Tocqueville was struck by the prominence of lawyers and law in the young American nation.[7] Lawyers dominated much of the design of American political institutions, and court cases often addressed critical issues. Several American presidents—Lincoln is a leading example—were lawyers as well as politicians. On the frontier of the new nation, in particular, becoming a lawyer was a significant method for upward mobility. Again, Lincoln is an example. Although the closing of the American frontier at the end of the nineteenth century supposedly ended an epoch in the country's history,[8] some of that spirit lives on. As *The Economist* magazine recently noted, "[t]he concept of the frontier, long dead in other countries, still matters in America."[9]

It is something of a stretch to link this background with modern American litigation, but the prominence of the frontiersman image is still coveted by American lawyers: "They see themselves as 'equalizers' who roam through American society looking for injustice, taking the side of victimized individuals against large, uncaring institutions and in the process making a lot of money. Plaintiff lawyers are mavericks who, as one of them put it, 'personify the American Dream.'"[10] Obviously this is not true of all American lawyers, but it provides a salient piece of background for the attitude

7. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J.P. Mayer & M. Lerner, eds., 1966) ("There is hardly a political question in the United States which does not sooner or later turn into a judicial one.").

8. *See* FREDERICK J. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920). Professor Turner argued that the "closing" of the American frontier in 1890 marked the end of an epoch in American history during which Americans dissatisfied with their lots could always pull up stakes and head for the frontier. The availability of this option, in turn, had fostered democracy and individualism, Turner concluded.

9. *The Magnificent Seven*, THE ECONOMIST, Feb. 8, 2003, at 14.

10. THOMAS BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 48 (2002). Similarly, a recent article in the American Bar Association Journal explained that "plaintiffs' lawyers tend to think of themselves as wielding the laser sword battling the forces of darkness." Terry Carter, *Offense and Defense*, A.B.A.J., June, 2003, at 42.

toward restricting lawyers' freedom of action.

As a further matter of background—and contrast to other countries—another important feature of American lawyers is that they often received limited formal education. Even today, "[c]ompared to England and Canada, the United States has fewer entry restrictions to the practice of law and a much larger number of lawyers per capita."[11] Certainly the obstacles confronting those who want to become lawyers in Japan are a great deal higher. In the nineteenth century, becoming a lawyer in the United States was much easier than it is today. Lincoln, for instance, did so through independent reading followed by apprenticeship to an experienced attorney. Little formal education was required. In the early twentieth century, formal legal education became more prominent, and there was a major controversy about whether it should be extended from two years to three, and whether law students should first be required to attend college.[12] Early on, American lawyering displayed a democratic and egalitarian spirit that is bolstered by the frontiersman image and probably is absent in other countries. Control over lawyers by the "elite" members of the profession—the judges—would cut somewhat against this spirit.

The right to jury trial also contributed to the democratic and egalitarian spirit of American litigation. Rather than focusing mainly on a legally-trained judge, the American lawyer often had to pitch his arguments to a jury made of what were truly his peers—also largely self-educated people. Although the judge had some authority to take a case from a jury or reject the decision reached by a jury, this authority was quite limited. Advocates of the jury trial resisted efforts to expand the judge's authority. In 1943, for example, Justice Black, a strong proponent of jury trial (and a former trial lawyer), denounced a decision of the Supreme Court as "a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion the essential [right to jury trial] guarantee of the Seventh Amendment."[13]

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11. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 984 (2000).

12. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICAN FROM THE 1850S TO THE 1980S, ch. 10 (1983) (describing the controversy that attended increased requirements for formal education for lawyers).

13. Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting). Current assumptions about the former limits on the judge's ability to alter the jury's decision may not sufficiently appreciate the latitude the judge enjoyed in the distant

American judges, too, were distinctive. Rather than emerging from professional training directed toward service in the judiciary, they came usually from the practicing bar, and, like other lawyers, often had limited formal education. They surely did not rise through a judicial bureaucracy. There was, indeed, no judicial bureaucracy in which to advance. To the contrary, judges were either elected or appointed by others (presidents or governors) who had been elected. Perhaps as a consequence of their backgrounds and the way in which they were selected, "the American judiciary, precisely because it is politically responsive and less formalistic is more pragmatic, quicker to invent new rights and remedies, and more willing to adapt the law to changing circumstances and new justice claims."[14] Thus:

> Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy oriented, more attentive to the equities (and inequities) of the particular situation. In the decentralized American legal system, if one judge closes the door on a novel legal argument, claimants can often find a more receptive judge in another court.[15]

Because they were former lawyers themselves and accustomed to the broad-ranging activities of attorneys, judges would ordinarily not be inclined to curtail the lawyers' latitude.

Taken together, these features served to magnify the importance of the individual lawyer. Not only would one wanting to be a lawyer confront low barriers to entry, he could pitch his arguments largely to a lay jury, and perhaps find an inventive judge with a background similar to his own, who might also respond to the equity of the lawyer's case. In such a system, constraints on the lawyer would meet with a cold reception.

A final feature of the American experience that bears on this overall picture of the crusading pursuer of right is the distinctive American reliance on private enforcement of public norms. Where other countries might entrust such enforcement largely to bureaucracies, that has not been in keeping with the American inclination, particularly in recent years:

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past. *See* Ann Woolhandler & Michael Collins, *The Article III Jury*, 87 VA. L. REV. 587, 592 (2001) (arguing that "pre-modern federal control of juries by the elaboration of law, the direction of verdicts, and the liberal use of commentary on the evidence along with new trials likely exceeded the overall level of modern judicial controls").

14. ROBERT KAGAN, ADVERSARIAL LEGALISM 112 (2001).

15. *Id.* at 16.

> Between 1964 and 1977, in a truly extraordinary surge of activity, Congress passed twenty-five major environmental and civil rights acts, plus far-reaching statutes regulating workplace safety, consumer lending, product safety, private pension funds, and local public education. At the same time, Congress was reluctant—for political, fiscal, and constitutional reasons—to create huge federal bureaucracies, with offices in every metropolitan area, to enforce all these demanding regulatory programs.... Armed with those rights, individual victims of injustice and energetic reform lawyers could act as "private attorneys general," bringing lawsuits against state and local governments for half-hearted implementation of federal laws, or they could sue regulated businesses directly. To energize the private attorneys general, Congress enacted scores of one-way fee-shifting statutes, which enabled successful plaintiffs to recover lawyers' fees from government and corporate defendants but did not require them, if they lost, to pay the defendants' lawyers bills.
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> In sum, whereas European polities generally rely on hierarchically organized national bureaucracies to hold local officials accountable to national policies, the U.S. Congress mobilized a distinctly American army of enforcers—a decentralized, ideologically motivated array of private advocacy groups and lawyers.[16]

Although this sketch is undoubtedly oversimplified, it introduces the distinctive background for considering judicial control of litigation in the United States. Not only might greater judicial control run against the grain of fiercely independent American lawyers, it could also be criticized as curtailing the enforcement capacity of those lawyers.

II. American Procedure Before the Federal Rules

The latitude American federal judges could wield over litigation was a matter of concern to some who shaped the U.S. Constitution. For a long time, there were constraints on their latitude, as explained by an American academic unnerved by the recent rise of judicial supervision of litigation:

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16. *Id.* at 47. For a criticism of the actual operation of this approach, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 214 (1983) (pointing up flaws in the behavior of private attorneys general, and arguing that these flaws resulted from intrinsic features of the American handling of this activity).

> [A]t the beginning of the 19th Century, the authority of federal trial court judges was subject to three significant checks. First, precedent and statute limited the primary discretion of judges. Unlike legislators, judges did not have unlimited discretion to exercise their authority as they saw fit. Second, in place of the interbranch checks that guarded against the abuse of executive and legislative power, the system of appellate review provided an intrabranch check on the power of federal trial court judges. Finally, the institution of the jury trial and the constitutional and statutory provisions created to preserve its continued validity checked judicial authority by allowing public participation in the fact-finding process of the federal courts.
>
> For almost one hundred and fifty years, the checks on the power of federal trial court judges continued to operate as effective restraints on the arbitrary exercise of power. Precedent, appellate review, and the jury trial effectively limited the scope of trial court discretion. Indeed, if one check waned, another compensated for it. For example, trial courts in the nineteenth century began to exercise an increasing amount of control over the jury through the development of strict rules of evidence and control over the sufficiency of evidence through directed verdicts and new trial orders. At the same time that trial courts began to regulate trials more elaborately, "Appellate courts kept pace, creating new procedures and scrutinizing trial courts' use of them." As trial courts regulated juries, appellate courts established precedent to govern the new trial court powers and regularly reviewed the exercise of trial court authority on appeal.[17]

Others report that by the early twentieth century reformers sought to curtail the power of lawyers and the role of the jury.[18] But structural features of American civil litigation, as well as judicial practices and expectations, limited such efforts to control the lawyers to the trial phase.

The structural aspect had to do with the assignment of cases. Most metropolitan courts had numerous judges and operated on what

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17. Todd Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 59-60 (1995) (quoting Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 641-42).

18. 21 CHARLES WRIGHT & KENNETH GRAHAM, FEDERAL PRACTICE & PROCEDURE, § 5005 at 79 (1977) (describing the early twentieth century view that the trial "should be firmly under the control of the only unbiased expert in the courtroom—the trial judge").

was called the master calendar system. This system meant that judges were assigned different tasks: some would be responsible for handling pretrial motions; others would handle civil trials; still others would handle criminal trials; and a presiding judge would have responsibility to assign tasks among the other judges. Under this system, a given case might come under the control of numerous judges should various matters arise. A motion would be heard by the assigned law and motion judge, but a later motion might go to a different law and motion judge. Setting the case for trial would come under the authority of the presiding judge. And the judge who tried the case would likely not have any contact with it until it was assigned for trial shortly before the trial was to begin. Consequently, there was no structure for supervising what the lawyers did until the trial was imminent.

The judicial practices and expectations that constrained judicial restraint of lawyers were consistent with a judicial attitude that the case should be left to the lawyers until trial. Accordingly, a judge would ordinarily have no contact with pending civil cases unless a motion was made. Because of the demanding fact pleading requirements of many American jurisdictions, these motions might effectively constrain lawyers whose cases were found unsatisfactory on the pleadings. Except for that restraint, it would be unusual for a judge to interfere with the lawyers' activities until trial approached.

III. Expansion of Attorneys' Procedural Latitude Under the Federal Rules

Although the prevailing attitude of judges was to leave the control of litigation to the lawyers, the apparatus the lawyers had at their command underwent a metamorphosis in the mid-twentieth century. Before that time, strict fact pleading requirements tended to limit the claims that could be made in court and constrict the suit to rather specific allegations.[19] The prohibition against "variance" limited the ability of lawyers to alter the position spelled out in their pleadings.

More significantly, the litigation apparatus gave lawyers few levers to prepare their cases for trial. Daniel Webster, the famed lawyer and legislator of the mid-nineteenth century, summed it up as follows: "If he would be a great lawyer, he must first consent to

19. For background, see Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

become a great drudge."[20] And that drudgery was investigation, not discovery. Investigation was, and is, relatively immune from intrusive judicial oversight.[21] But because there was no form of compulsion a lawyer could use to pursue an investigation, it was also limited by the willingness of any source of information to cooperate.

The solution to this problem, of course, would be to use formal discovery. But that was difficult until the Federal Rules of Civil Procedure (Federal Rules or Rules) were adopted in 1938. Very limited discovery was allowed in the courts of many states, but under the widespread Field Code, the principal device for revealing the ground for claims or defenses was precise pleadings.[22] Federal courts, meanwhile, generally followed state court procedure. But federal courts often did not permit even the limited discovery that was available in state court.[23] The Supreme Court signaled its disapproval of broad discovery in a 1911 case in which it denounced any effort by a party "to pry into the case of his adversary to learn its strength or weakness" as a "fishing bill."[24]

The adoption of the Federal Rules in 1938 worked a major change in the latitude available to lawyers in the pretrial phase. One reason was the loosening of pleading requirements. The Rules replaced the fact pleading requirement with what has been called notice pleading, which greatly relaxed the requirements for setting forth a claim or defense.[25] Not only did the pleadings not have to set forth in a precise way the grounds for a claim or defense, the Rules also provided a very liberal opportunity for amendment so that a party could change allegations during the case, even during the trial.[26]

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20. RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 330 (3d ed. 2000).

21. *See, e.g.*, Corley v. Rosewood Care Center, Inc., 142 F.3d 1041 (7th Cir. 1998) (holding that a district court judge could not require plaintiff's lawyer to notify defendants of interviews with prospective witnesses, even though these interviews were under oath and recorded by a court recorder, because they were nevertheless not formal depositions).

22. Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 696-97 (1998).

23. *Id.* at 698-701.

24. Carpenter v. Winn, 221 U.S. 533, 540 (1911).

25. *See* Conley v. Gibson, 355 U.S. 495 (1957) (stating that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief"); FED. R. CIV. P. 8(a)(2) (stating that complaint need only contain a "short and plain statement of the claim, showing that the pleader is entitled to relief").

26. *See* FED. R. CIV. P. 15(a) (amendment before trial); FED. R. CIV. P. 15(b)

This change made U.S. pleading much less demanding than that in most other countries.[27] Thus, even if the lawyer did not know of the claim or defense at the outset, it would be possible later to include it if discovery revealed additional grounds.

The truly dramatic change, however, was the great expansion of discovery. Contrasted to the very limited discovery that had been allowed previously, the new Federal Rules accomplished a revolutionary change. As Professor Subrin explained:

> If one adds up all the types of discovery permitted in individual state courts [before the Federal Rules were adopted], one finds some precursors to what later became discovery under the Federal Rules; but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.[28]

To quote Professor Hazard: "This system of pretrial discovery is unique to the United States."[29] He elaborates: "[R]ecognizing in a party a *right* to require production of evidence, as distinct from a party's right to ask the *court* to require production of evidence, violates a constitutional principle of adjudication in the civil law system."[30] For our purposes, discovery under the Federal Rules endows the lawyers with an extraordinarily broad method of using judicial authority to extract information from parties and from nonparties.[31] And the Supreme Court did an about-face on "fishing expeditions" in 1947, thirty-six years after it had denounced them in 1911: "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his

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(amendment during or after trial).

27. As an illustration of this difference, consider Rule 12 of the draft proposed Transnational Rules of Civil Procedure, which requires plaintiff to describe both the facts alleged and the evidence that supports those allegations. *See* AMERICAN LAW INSTITUTE, Principles and Rules of Transnational Civil Procedure, Discussion Draft No. 4 (April 18, 2003). According to the comment, this provision requires detail like that demanded by the former American code pleading regime rather than the notice pleading of the Federal Rules.

28. Subrin, *supra* note 22, at 719.

29. Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017, 1018 (1998) (contrasting the role of the judge in fact-gathering in continental judicial systems with the handling of such issues in American litigation).

30. *Id.* at 1024.

31. *See* FED. R. CIV. P. 45 (authorizing a subpoena on nonparties requiring them to produce documentary evidence or appear for deposition testimony).

opponent's case."[32]

Although the framers of the Rules were aware of the risks of abuse of this broad-ranging right granted to lawyers, allowing them to employ the court's power to obtain information,[33] it does not seem that the more aggressive possibilities of the new procedure were grasped at once. Meanwhile, amendments to the Rules further liberalized the use of discovery. By the 1950s and 1960s, however, lawyers had learned to use broad discovery, and the rapid deployment of photocopiers during that period greatly expanded the materials that could be sought using document requests.

Beginning in the 1970s, there was a strong reaction, and many urged that "discovery abuse" had become a substantial problem.[34] At first, there were proposals to respond to these concerns by building limits into the Rules—narrowing the scope of discovery and imposing numerical limitations on the use of various discovery devices.[35] But those proposed limitations were largely jettisoned, and in 1983 the Rules were instead amended to direct the judge to take early and active judicial control of discovery—judicial management of litigation.[36] The proponents of rule-based limits on discovery proclaimed themselves happy with this response.[37]

Thus, the emergence of managerial judging—and its attendant limitations on lawyer latitude—can be seen as a response to the great broadening of that latitude effected by the adoption of the Federal Rules. But before turning to the evolution of managerial judging, another strand needs to be added.

IV. Substantive Inducements to Judicial Control: The Rising Importance of "Public Law" Litigation

As noted above, the American judiciary is unusually (perhaps uniquely) independent, and often receptive to new claims or new remedies. We have also seen that, during the 1960s and 1970s, there was an outburst of statutory expansion of rights, and that these rights

32. Hickman v. Taylor, 329 U.S. 495, 507 (1947). *Compare supra* text at note 24 (discussing Carpenter v. Winn, 221 U.S. 533 (1911)).

33. *See* Subrin, *supra* note 22, at 720-22.

34. *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 752-53 (1998).

35. *Id.* at 753-60.

36. *See id.* at 760-64.

37. *See id.* at 764.

were generally enforceable under the American private attorney general technique.

These substantive developments contributed to the emergence of increased judicial control of litigation; indeed, there was a sort of synergy between the substantive and procedural changes. This synergy was described most vividly in Professor Abram Chayes's seminal 1976 article *The Role of the Judge in Public Law Litigation*.[38] Chayes began with what he called the "received tradition" of American litigation, an individualistic enterprise that depended on the parties' efforts and assumed the judge would take an active role:

> The process is *party-initiated* and *party-controlled*. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.[39]

This approach to litigation broke down, he argued, due to the rising importance of public law litigation: "Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies."[40]

This description may overemphasize the importance of this form of litigation, and it perhaps does not adequately recognize the breadth of the concept of public law litigation.[41] Nonetheless, it

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38. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

39. *Id.* at 1283.

40. *Id.* at 1284.

41. *See* Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 668-82 (1988) (noting that other types of litigation—including some mass tort litigation—could also be seen as imbued with public interest) [hereinafter, *Public Law Litigation and Legal Scholarship*]. Indeed, one of the arguments about public access to discovery results in tort litigation is precisely that there is a public interest in materials exchanged through discovery in "private" litigation. *See* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (describing arguments about the asserted public interest in such litigation).

Recently, Professor Molot has affirmed that time has, in some ways, passed Chayes's article by:

> By the late 1990s, however, Professor Chayes's model itself was outdated. Chayes may have succeeded in addressing the civil rights class actions of the 1960s and 1970s, but he failed to anticipate and "capture the dynamics of modern mass tort litigation," which came to dominate the litigation landscape of the 1980s and 1990s.

captured some important aspects of a shift in the emphasis of American procedure that followed from the increasing importance of this kind of case. One is what Chayes called "the Triumph of Equity"—the growing importance of equitable relief in cases that called for federal judges to take responsibility for public institutions such as school districts or prisons on a long-term basis.[42] This changed the focus of litigation: "Instead of a dispute retrospectively oriented toward the consequences of a closed set of events, the court has a controversy about future probabilities."[43]

That shift to a prospective focus led to a second feature of the new form of litigation, the changing character of fact-finding:[44]

> The elaboration of a decree is largely a discretionary process within which the trial judge is called upon to assess and appraise the consequences of alternative programs that might correct the substantive fault. In both the liability and remedial phases, the relevant inquiry is largely the same: How can the policies of a public law best be served in a concrete case?[45]

A third distinctive characteristic of this new form of litigation was the task of drafting such a decree.[46] The legal norms sought to be enforced do not themselves provide specifics that would be helpful to the judge; the Constitution's prohibition on cruel and unusual punishment does not, for example, specify what exact changes must be made at a prison to improve the conditions of the inmates sufficiently to satisfy the constitutional requirement. So judges had to devise detailed decrees that would be workable for the parties. This process necessarily involved an emphasis on cooperation and often also the participation of many people in fashioning the specifics.

Judges themselves had begun, by this time, to appreciate that these new types of cases called for a new type of judicial action. Consider the views of a judge handling a major water pollution case in which the critical questions were whether, and how, the court might require the defendant to alter the operation of its plant to

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Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27, 29 (2003) (quoting Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 Val. U. L. Rev. 413, 414-15 (1999)).

42. Chayes, *supra* note 38, at 1292-96.

43. *Id.* at 1292.

44. *Id.* at 1296-98.

45. *Id.* at 1296-97.

46. *See id.* at 1298-1304.

minimize pollution at a lake:

> The role of the court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the [water pollution] statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.[47]

The net effect of these developments, thus, was to shift authority from the lawyers to the judge. In Chayes's words:

> The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation.[48]

This shift in judicial behavior—what we now call managerial judging—actually had a broader impact than Chayes seems to have appreciated. As I have written elsewhere:

> The features of public law litigation that prompted judicial efforts to control litigation cannot meaningfully be limited to that kind of litigation. As might have been expected, judges promptly applied the lessons they had learned from their public law litigation experiences outside that realm. Having found a significant public interest in most civil litigation, judges reacted by taking charge of ordinary cases in a way somewhat similar to that in which they had taken control of the cases Chayes described.[49]

V. The Emergence of Managerial Judging

Although managerial judging came to flower during the last quarter century, its roots lie much earlier, and in the state courts. The pretrial conference, the device later used by federal judges to take control of litigation from an early point, found its origins in a procedure employed by the Circuit Court of Wayne County, Michigan, in the 1930s.[50] This practice called for the lawyers to meet

47. United States v. Reserve Mining Co., 56 F.R.D. 408, 413 (D. Minn. 1972).
48. Chayes, *supra* note 38, at 1284.
49. *See Public Law Litigation and Legal Scholarship*, *supra* note 41, at 675.
50. *See* Edson R. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36

with the trial judge after discovery was completed to supply the sort of factual detail they were no longer required to include in the pleadings, and to disclose how they intended to go about presenting their case at trial. A study of pretrial conferences in the New Jersey state courts in the 1960s concluded that pretrial conferences increased the chance that the case would be well presented, eliminated inefficiencies at trial, and improved the settlement process.[51]

This sort of pretrial conference shortly before trial was authorized but not required by Rule 16 of the Federal Rules from the beginning. In the words of the Federal Rules drafting committee Reporter, "[t]he judge finds out what the case is all about, how much is admitted on each side, and how much not, and then he goes on to the question of manner of proof."[52] But the longstanding habits of federal judges, combined with the master calendar system that operated in many courts, meant that the process was limited to interaction with the lawyers shortly before the trial, and after most or all of the pretrial activity, particularly discovery, had been completed.

The stimulus for going beyond this activity was initially a growing concern about large-scale litigation. In the late 1940s, an illustrious committee, appointed to study the peculiar problems of "protracted litigation," suggested that judicial control would be a suitable reaction.[53] This work produced seminars for federal judges in the 1950s that emphasized the value of judicial control.[54] By 1960, one district court judge was stressing the points that became widespread over the ensuing thirty years:

> The early and expeditious termination of a civil suit largely rests in judicial supervision . . . that is primarily directed to see that the claims at issue are prosecuted and brought to final termination within such short time as due process, justice, and the reasonable

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MICH. L. REV. 215 (1937).

51. *See* MAURICE ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

52. Charles Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 167 (1956).

53. *See* Judicial Conference of the United States, Committee Report, *Procedure in Anti-Trust and Other Protracted Cases* (1951), *reprinted in* Hon. Leon R. Yankwich, *"Short Cuts" in Long Cases: A Commentary on the Report Entitled Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, 13 F.R.D. 41, 62 (1951).

54. *See* Hon. Alfred P. Murrah, *Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges*, 21 F.R.D. 395 (1957); Hon. Alfred P. Murrah, *Proceedings of the Seminar on Protracted Cases for United States Judges*, 23 F.R.D. 319 (1958).

> interests of the litigants allow and the facts of the particular litigation fairly permit. We must be mindful that, while unreasonable delay should not be permitted, justice is essential. Calendar control is but one phase of the judicial supervision to be exercised over all civil litigation.[55]

Beginning in the 1960s, federal courts increasingly employed a single assignment system, under which a case was assigned to a single judge from the time it was filed.[56] With that innovation, judges could use Rule 16 conferences to take early control of litigation. Many judges began issuing orders in all civil cases requiring the lawyers to meet for a status conference shortly after the suit was filed. At these conferences, the judge might inquire about a variety of topics relevant to the processing of the case, and endeavor to develop a discovery plan. As one judge who favored vigorous use of this technique explained, the judge could use the encounter to develop a sense of the lawyers:

> [T]he judge should consider his sense of the attorneys' diligence, experience, and competence. Since a structured pretrial calendar can force attorneys to prepare, even a simple case can benefit from elaborate pretrial where the attorneys might otherwise allow the case to fall into confusion. A judge should also be alert to the particularly combative attorney who, if the case is not actively managed during pretrial, might succeed in turning a trial that should be a molehill into a mountain.[57]

Not only is the status conference an occasion for the judge to assess the need to take active control of the lawyers' activities, it is also an occasion for alerting them to the judge's insistence that they toe the judge's line:

> [C]ertain intangible benefits also flow from this early meeting of attorneys and judge. The meeting itself warns the attorneys that they have a vigilant judge, and it may therefore prod attorneys who might otherwise be less than diligent into transferring the case to their "active" files. . . . In short, the status conference is usually the first personal contact between the judge and the attorneys, and the judge can use his considerable influence to set the tone of a

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55. Hon. Sylvester J. Ryan, *Effect of Calendar Control on the Disposition of Litigation*, 28 F.R.D. 66, 67 (1960).

56. *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 522-23 & n.127 (1986).

57. Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 781 (1981).

> relationship in which he and the attorneys are likely to be engaged for the duration of the litigation.[58]

It should be apparent that judges doing this sort of assessment have moved far beyond the passive arbiter of an earlier era, and that they necessarily constrain attorneys' latitude as they pursue this sort of judicial management of litigation. And it should also be apparent from the undercurrent of impatience with attorneys that judges inclined to act this way were less likely to defer to what the lawyers wanted than judges had been in an earlier era.

In the 1970s this activity was only pursued by a limited number of judges, however. Some of these judges proselytized, both with their brethren on the bench and with the rulemakers. In 1983, this effort led to changes to Rule 16. Where formerly the rule was entirely permissive and focused on planning when a trial was imminent, after Rule 16 was amended in 1983, it *required* judges to set schedules for certain things soon after the suit was filed,[59] and authorized them to inquire into and make orders about a large variety of other topics.[60] In 1993, additional rule changes mandated an early meeting of the attorneys and required that they develop a discovery plan and submit a report to the judge about the needs of the case before the scheduling order could be issued.[61]

In sum, these changes in rules and judicial orientation meant that attorneys who had formerly had great latitude before trial to approach things as they pleased could no longer proceed without constraint.[62] And the stimulus was largely the expansion of moves

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58. *Id.* at 782.

59. *See* FED. R. CIV. P. 16(b).

60. *See* FED. R. CIV. P. 16(c).

61. *See* FED. R. CIV. P. 26(f).

62. Another development of the same era has been increased emphasis by judges on settlement promotion. Although that activity by judges may in some instances constrain litigation activity by the lawyers, in general it is welcomed by lawyers and therefore not really an instance of judicial limitation on the freedom of action of the lawyers. *See* Wayne Brazil, *What Lawyers Want from Judges in the Settlement Area*, 106 F.R.D. 85, 85 (1985) (describing survey of lawyers showing that "in overwhelming numbers, litigators say judges should get *actively* involved in settlement negotiations in most cases in federal court").

Another major event in U.S. civil procedure that might be included in a discussion of the constraints judges wield over lawyers in the increased prominence of FED. R. CIV. P. 11, which authorizes judges to punish lawyers for making groundless claims or arguments. This rule was substantially amended in 1983, and the resulting increase in judicial activity produced controversy and assertions that it was working a "transformation" of American litigation. *See* Stephen Burbank, *The*

available to lawyers under the expansive Federal Rules.[63]

VI. The American Critique of Managerial Judging

Many lawyers chafe under the recently developed and increasingly intrusive judicial attitudes, and a number of academics have challenged the wisdom and propriety of this new form of judicial behavior.[64] Exhaustive examination of these criticisms is beyond the scope of this paper, but it is important to identify and comment briefly on several.

(1) Does Judicial Management Constrain Lawyers Too Much?

We have already seen that private enforcement of public norms is an important feature of litigation in America.[65] If judicial control of private lawyers unduly limits their ability to pursue and expose wrongdoing, it would undercut the assumption that their activity is a suitable method of enforcing those public norms. As Dean Carrington pointed out several years ago:

> Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds or thousands of lawyers, each armed with a subpoena power by which

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Transformation of American Civil Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925 (1989). But the rule was amended again in 1993 to retract many of its most aggressive provisions, and to build in additional procedural protections against inappropriate imposition of sanctions. So it no longer seems to be of equal importance.

Another rule change that might appear to invite more aggressive court involvement is the addition to Rule 26 of the "proportionality" provision now contained in Rule 26(b)(2). Although this directive to the judge to limit or forbid excessive discovery appears to call for aggressive judicial effort, in fact it has not produced much. *See* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, § 2008.1 at 121 (2d ed. 1994) (reporting that the addition of these provisions to the rules "seems to have created only a ripple in the caselaw").

63. *See* Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 266 (1985) (urging that increased judicial management was designed to "assist in restoring the health of the system," and that a judge who adhered to the "passive night watchman" role of former times no longer could do so).

64. For the most prominent example of academic criticism, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). For a recent and extended critique, see Molot, *supra* note 41.

65. *See supra* text accompanying note 16.

> misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.[66]

For other nations, of course, this concern may not exist or may not be important. In Europe, for example, governmental officials reportedly wield investigative authority that far outstrips U.S. discovery techniques.[67] Unless other countries correspondingly rely on private enforcement to accomplish public goals, concern about constraining private lawyers may be insignificant. But even in the United States there seems limited risk that this sort of constriction of discovery is imminent.[68]

When the Advisory Committee on Civil Rules embarked in 1996 on its Discovery Project (a comprehensive review of discovery practices in the American federal courts), one of the desires it repeatedly encountered was that judges exercise more "parental supervision" over discovery.[69] When the Federal Judicial Center surveyed lawyers in 1997, it found that the most popular solution to discovery problems they endorsed was "increasing court management/availability of judges to rule on discovery disputes."[70] The second most popular approach was "increasing sanctions/adopting civility code."[71] When asked to identify the most promising approach for reducing discovery problems, by far the largest number of those surveyed opted to "increase judicial case

66. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

67. For example, Philip Shishkin, *European Regulators Spark Controversy with "Dawn Raids,"* WALL ST. J., March 1, 2002, at A1, describes surprise evidence-gathering activities of European Union antitrust investigators. Without any advance judicial authorization, "EU antitrust agents can walk without warning into any company doing business in the 15-nation union to look for whatever they think might be proof of illegal activity." American discovery, by way of contrast, requires notice and a right to object and judicial review of the objections before the discovery goes forward.

68. I have elaborated on this point in Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TULANE J. INT'L & COMP. L. 153 (1999) (concluding that, despite numerous efforts to curtail excessive discovery, American discovery remains qualitatively different from that in other countries).

69. I served as Special Reporter of the Advisory Committee in connection with its Discovery Project and recall repeated instances in which lawyers voiced such concerns.

70. Thomas Willging et al., *An Empirical Study of Discovery Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 587 tbl. 36 (1998).

71. *Id.*

management."[72] These results hardly indicate that there is currently a severe problem with constraining lawyers' pursuit of cases.

A related consideration that might warrant note is that even though lawyers do not think that there is a problem with increased judicial supervision, clients could so object. We have no data on that, but there is some reason to think that litigants emphasize procedures that give them control over the litigation.[73] Because lawyers are, in theory, obliged by rules of ethics and professional responsibility to follow the directions of their clients, one could view constraints on the lawyers' activities as intruding unduly on the ability of clients to direct their own cases. However, this concern seems an improbable ground for criticizing judicial regulation of lawyers' litigation activities. For one thing, "lawyer-client relations are more often perfunctory and superficial than intimate; . . . the locus of control is shifting toward lawyers rather than clients . . . . [L]itigants are frequently only names to both lawyers and court personnel . . . ."[74] Moreover, as a general matter, American law assumes that the lawyer should play the leading role in the activities that case management regulates:

> It is common experience that attorneys and their clients frequently differ and even violently disagree between or among themselves with reference to the conduct of the procedure that should relate to the trial of the action. However, it is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of an action . . . .[75]

(2) Does Judicial Management Unduly Interfere with the Adversary System?

The adversary system is said to be a distinctive feature of American and English civil procedure, so that harming it might seem unimportant to those in the rest of the world. But that American assumption may well be too facile. Professor Langbein, for example, has argued that German civil procedure is similarly adversarial except

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72. *Id.* at 587 tbl. 37.

73. *See, e.g.*, Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1416 (1979) (reporting on psychological experiments that indicate that participants preferred those procedures that gave them personal control over the proceedings).

74. Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92.

75. Zurich Gen. Accident & Liab. Ins. Co. v. Kinsler, 81 P.2d 913, 917 (Cal. 1938).

that the principal authority for gathering the evidence rests with the judge.[76] And American case management increasingly includes early regulation of the conduct of the trial. So the concern may be of greater interest to others than might initially appear.

The fear is that, by becoming deeply involved in the litigation at an early stage, the judge may impair his ability to act with impartiality:

> The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received. Moreover, judges are in close contact with attorneys during the course of management. Such interactions may become occasions for development of intense feelings—admiration, friendship, or antipathy.[77]

Indeed, it could be argued that the process of fashioning a management program for litigation itself will interfere with the need for the judge to keep an open mind until all the information is gathered. In the words of Professor Fuller's classic study endorsing the adversary method:

> [F]ailure generally attends the attempt to dispense with the distinct roles traditionally implied by adjudication. What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is wanting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice, or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. . . .
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> An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in

76. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). There are other views on this question. *See, e.g.*, W. Zeidler, *Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure*, 55 AUSTRALIAN L.J. 390, 394 (1981) (asserting that, "to our English colleagues the German judge will seem highly vocal and dominant whereas counsel will appear to act with somewhat subdued adversary zeal").

77. Resnik, *supra* note 64, at 427.

> terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.[78]

These are forceful arguments, but they can be forcefully countered. For one thing, the sorts of topics that are usually the subject of regulation by judicial management—the timing of trial preparation and the scope of far-reaching discovery—do not inherently create the sorts of risks posed by Fuller. Moreover, unless there is to be no judicial oversight of the lawyers at all, some judicial assessment of these matters appears essential. So one can conclude that Fuller's concerns are overstated if applied to judicial management, which was not his focus.

Beyond that, Fuller's objections may fail to deal with the reality emphasized by a judicial proponent of management—that American judges are often called upon to segregate pieces of a proceeding in their minds:

> Impartiality is a capacity of mind—a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotions from one's rational faculties. Only because we trust judges to be able to satisfy those obligations do we permit them to exercise such power and oversight. On the basis of this trust, we permit the same judge who presides over a pretrial suppression hearing [in a criminal case], where defendants may solemnly proclaim their ownership of the seized evidence in order to establish their standing, to sit in the subsequent trial and issue further rulings.[79]

As this judge concludes, "there is nothing sacrosanct about the adversarial system."[80]

For those whose systems are a good deal less adversarial than the American model, presumably the risk that the judge might be affected by early exposure to the case has not proved an insurmountable difficulty.

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78. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

79. Peckham, *supra* note 63, at 262-63.

80. *Id.* at 265.

(3) Does Judicial Management Give Judges Too Much Power?

As noted earlier, the constraints on district court judges have waned in the era of managerial judging. Indeed, this activity inherently involves ad hoc determinations about how a case should be handled, and these decisions are relatively immune to review by other judges. Other judicial systems presume much greater authority to review such decisions by first level judicial officers.[81] And it cannot be denied that in some cases judicial scheduling seems dubious at best.[82]

I have recently examined this concern with care,[83] and doubt that it is significant in comparison to the value of judicial restraint on lawyers' use of the very substantial new latitude that modern American procedure gives them. Although one might worry that judges would indulge their attitudes toward the validity of various types of claims before them, that concern seems modest. The very reason that timing decisions are delegated to trial court judges is that they are largely divorced from the underlying substance of the case. There is limited ground for concluding that procedural discretion has been wielded to serve judges' substantive agendas with much frequency.[84] There hardly seems a widespread uprising of lawyers asserting that federal judges as a group are regularly using their procedural discretion to advance their substantive preferences.[85] As a

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81. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY, 48-49 (1986) (describing more intensive review of all aspects of a lower court's decision-making as a matter of course in some judicial systems).

82. For an illustration, consider Otero v. Buslee, 695 F.2d 1244 (10th Cir. 1982), in which both plaintiff and defendant had made summary judgment motions and, as a result, did not initiate discovery. When the district court did not resolve the summary judgment motions, defendant filed a motion asking the court to extend the cutoff date for discovery until the summary judgment motions were decided, but the district court did not decide that motion, either, before the discovery cutoff passed. It then denied all motions, and defendant objected to being denied discovery after losing at trial. The appellate court held that defendant could not complain about being denied "belated" discovery. One might argue that this conjunction of developments made the district court's actions so unreasonable as to constitute an abuse of discretion, but the appellate court's attitude was that defendant took its chances by failing to initiate its discovery before the discovery cutoff even though that discovery would be wasted if either summary judgment motion were granted.

83. *See* Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. (forthcoming 2003).

84. *See* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 362 (1975) (asserting that "it is not at all obvious that judges who think they have discretion will give freer rein to their personal preferences than those who do not").

85. Indeed, it may be that individual ideological differences make less difference

consequence, although the theoretical potential exists for such activity, that potential need not lead one to endorse aggressive remedial measures presently.[86]

(4) Do Managerial Judges Require Lawyers To Do Too Much Wasted Work?

It is undeniable that judicial management can force a lawyer to do more work than would be done otherwise, or to do it sooner than would be done otherwise. Indeed, that may be one of the court's objectives, since management can overcome a lawyer's tendency to be lazy about full and prompt preparation of the case.[87] In the federal district court in San Francisco, for example, there has long been a requirement that the lawyers prepare an elaborate pretrial statement as trial approaches so that the judge can use it in fashioning a final pretrial order. The former chief judge of that court recognized that lawyers had reasons for resisting this requirement:

> Many attorneys feel that such orders are, in effect, analogous to the much-maligned code and common law pleading systems that once prevailed in this country, and are therefore contrary to the spirit of simplicity embodied in the Federal Rules of Civil Procedure. Some members of the bar also feel that many judges use burdensome pretrial orders as a wedge for settlement and that such rules have little to do with simplification of the issues for trial.[88]

Sometimes appellate courts agree with this sort of objection and denounce what they view as unduly demanding pretrial requirements:

> Ours is an adversary system of justice. Local Rule 2.08 is inquisitorial in tone and purpose. In our system lawyers worry about the whereabouts of witnesses. The court does not. Lawyers

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than other factors. Researchers who used psychological techniques to design and evaluate a survey of U.S. Magistrate Judges reported "a more fundamental source of systematic error: wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent or predictable mistakes in particular situations." Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001).

86. Perhaps this is an appropriate point to mention that an alternative to judge-designed methods for each case would be to prescribe an overall schedule for all litigation. California tried something like that for its state courts, implementing what it called a "fast track" for civil litigation. The strictness and rigidity of this approach caused numerous complaints from lawyers. *See* Richard L. Marcus, *Malaise of the Litigation Superpower*, *in* CIVIL JUSTICE IN CRISIS 71, 103-08 (Adrian A.S. Zuckerman ed., 1999).

87. *See supra* text accompanying notes 57 and 58.

88. Peckham, *supra* note 57, at 787.

> worry about proof. The court does not—except in the rare case of collusion. Lawyers get the case ready for trial. The court does not. Local Rule 2.08 subordinates the rule of the lawyer to that of the administering magistrate, reducing counsel to the role of clerical assistants who are to anticipate imaginatively what other matters ought to be embraced within an endless pretrial order.[89]

A comprehensive study of case management by the RAND Corporation in the mid 1990s gave support to concerns about unnecessary expense and activity as a result of case management. Based on a review of thousands of cases in twenty judicial districts, this study concluded:

> Early judicial management has significant effects on both time and cost. We estimate a 1.5 to 2 month reduction in median time to disposition for cases that last at least nine months, and an approximately 20-hour increase in lawyer work hours. Our data show that the costs to litigants are also higher in dollar terms and in litigant hours spent when cases are managed early. These results debunk the myth that reducing time to disposition will necessarily reduce litigation costs.[90]

For a long time, there has been a question about whether case management "works," in the sense that it reduced the expenditure of both time and money on litigation.[91] Under these circumstances, there is continuing reason to worry that the tradeoffs might not be worth the cost. But it is worth noting that this critique is not based on the inherent desirability of freedom of action by lawyers, but the concern that curtailing that freedom of action actually increases overall costs of litigation. And it could be that case management also improves the quality of litigation. That was the conclusion four decades ago about pretrial practices in the New Jersey state courts,[92] and it is not something that a study like RAND's could measure.

(5) Is Case Management Too Informal?

In traditional American litigation, the judge does not get

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89. McCargo v. Hedrick, 545 F.2d 393, 401 (4th Cir. 1976).

90. JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996).

91. For a review of the question, see Richard L. Marcus, *"Deja Vu All Over Again"? An American Reaction to the Woolf Report*, *in* REFORM OF CIVIL PROCEDURE 219, 232-35 (Adrian A.S. Zuckerman & Ross Cranston eds., 1995).

92. *See supra* text accompanying note 51.

involved unless and until the parties made a motion. The procedure for such motions is fairly consistent across courts. The moving party files a memorandum arguing that the motion should be granted, perhaps supported by affidavits. Then the responding party may do the same, and sometimes after that the moving party gets a chance to reply in writing to the opposing papers. Only then is there a hearing, and the arguments made at the hearing should follow from the points made in the papers filed with the court.

When they manage cases, judges often encounter issues that might be the subject of a motion—particularly a discovery motion—and resolve them without the formal presentation that attends a motion. Informal resolution often saves time and money, particularly if the alternative is insistence that a formal motion be filed. But neither the lawyers nor the judge has as much time to reflect on the arguments or issues in an informal setting. As a very thoughtful magistrate judge has noted, this manner of proceeding may sometimes produce decisions that are not as good as they would be if done in the normal way:

> Prompt rulings can save parties considerable expense and expedite the pretrial process. But the depth of consideration, by both counsel and the neutral, is necessarily limited. I have been forced to acknowledge that fact by parties urging reconsideration of my tentative discovery rulings. In some instances my initial instinct was misplaced, the situation was more complex than I appreciated, and after more careful consideration I have reversed my original decision. . . . I have become more sensitive to the dangers inherent in speedy and wholly oral proceedings.[93]

VII. Conclusion: Whither Case Management in America?

In the United States, many are anxious to avoid "judicial activism." Yet it can be said that "[m]anagement is a new form of 'judicial activism.'"[94] But despite the general criticisms of judicial activism, the trend toward case management in America does not appear to be abating. In 1990, for example, Congress declared itself in support of case management.[95] Indeed, if anything, case

93. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 420 (1986).

94. Resnik, *supra* note 64, at 380.

95. In connection with adopting the Civil Justice Reform Act, the Senate Judiciary Committee (which originated the legislation) explained in its official report that the Act sought to implement the "benefits of enhanced case management"

management's impact seems to be expanding. We are told that it is spreading beyond our shores.[96]

At the same time, the debate in the United States about the desirability of American-style litigation continues.[97] In addition, it seems that other countries may be gravitating toward developments in litigation that make it more like America's. Thus, we have recently been told that China,[98] Russia[99] and even Japan[100] may see a change in frequency or type of litigation. And lawyers in some countries are gaining some tools that resemble the ones American lawyers have long had to pursue their cases. We in America have learned, for example, that in Japan there is now some opportunity to do discovery.[101] Some urge that civil law systems will soon have to include some discovery in their menu of procedural offerings.[102]

Although few other countries—if any—are likely to embrace the private enforcement model that makes private litigation so important in the United States, the trend-line nevertheless seems inclined toward increased lawyer latitude in many countries. If the American experience is any indication, that may be accompanied by greater reliance on judges to supervise these lawyers. If so, it would seem in keeping with the general inclination of civil law systems to authorize

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because "greater and earlier judicial control over civil cases yields faster rates of disposition." S. REP. NO. 101-416, at 16 (1990).

96. For example, England has recently embarked on a revised procedure for civil cases based on a 1995-96 study by Lord Woolf, whose Final Report devotes its first substantive section to case management. *See* LORD WOOLF, ACCESS TO JUSTICE § II (1996). He began by declaring that "the introduction of case management [is] crucial for the changes which are necessary in our civil justice system." *Id.* at 14.

97. *See* CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2003) (arguing that American litigation is desirable because it has permitted victims to shift the cost of accidents to wrongdoers).

98. *See, e.g.*, *Banking on Growth*, THE ECONOMIST, Jan. 18, 2003, at 67 (reporting that China's highest court "said that shareholders could file individual or class-action lawsuits against companies that lie about their accounts").

99. *See* Steven Lee Myers, *Russians Become Litigious: Survivors of Theater Siege Sue*, N.Y. TIMES, Dec. 6, 2002, at A3.

100. *See* Carl Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769 (2001).

101. *See* Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 694 (1998); Toshiro M. Mochizuki, *Baby Step or Giant Leap?: Parties' Expanded Access to Documentary Evidence Under the New Japanese Code of Civil Procedure*, 40 HARV. INT'L L.J. 285 (1999).

102. *See* Kuo-Chang Huang, INTRODUCING DISCOVERY INTO CIVIL LAW (2003) (contending that the lack of discovery in civil law systems results in inaccuracy, unfairness, and inefficiency, and that it is therefore necessary for continental civil procedure to introduce some form of discovery).

greater judicial control over the proceedings and the lawyers than was traditionally true in the United States. In that sense, then, America is falling in line with the rest of the world, not the other way around. But as with discovery,[103] there is likely still to be a gulf between the reality of the American lawyer and the experiences of lawyers elsewhere.

103. *See* Marcus, *supra* note 68.